Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
		MB Docket No.17-179
Applications of Tribune Media Company and	)	
Sinclair Group Broadcast Group	)	
For Consent to Transfer of Control of Licenses	)	
And Authorizations	)	

PETITION TO DENY OF HERNDON RESTON INDIVISIBLE

Pursuant to Sections 309(d) and 310(d) of the Communications Act of 1934, as amended, Sections 47 USC 309(d) and 310(d), and by its members, Herndon Reston Indivisible ("HRI") respectfully submits this petition to deny the above-captioned applications. This petition responds to the *Media Bureau's Public Notice Establishing Consolidated Pleading Cycle For Amendments To The June 26, 2017, Applications To Transfer Control of Tribune Media Company To Sinclair Broadcast Group, Inc., Related New Divestiture Applications, And Top Four* Showings *In Two Markets*, DA 18-530, released May 21, 2018. [1]

I. INTRODUCTION.

The history of this proceeding is one of substantial delay and flagrant waste of Commission resources due to Sinclair's repeated modifications of its incredibly complex merger/divestiture proposal. This strategy has been necessitated by Sinclair's all-consuming drive to achieve a monopoly stranglehold on

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[1] 1) HRI has standing to participate in this proceeding. Members of HRI are regular viewers of Sinclair Broadcast Group's Station WJLA-TV, in Washington, D.C. HRI previously filed an Informal Objection to the Sinclair-Tribune applications In September 2017, held meetings with FCC staff, and submitted letters to the staff and the Commissioners regarding the proposed merger.

American local television. Well over the statutory national ownership cap, Sinclair has desperately sought to bring its proposed merged holdings downward through an increasingly unconvincing "sell but do not divest strategy." Faced with a firestorm of national outrage over its initial and earlier revised proposals for merger—from all ends of the ideological spectrum—that Sinclair seems not to have anticipated, Sinclair has presented a series of moving targets to this agency and the Department of Justice. Under apparent pressure from the agencies vested with authority to pass on the merger to trim back the number of stations it proposes to acquire, Sinclair now has compelled the agencies to evaluate yet another divestiture scheme, requiring a new comment period.

But, as demonstrated below, these many of these latest 23 "divestiture" promises patently do not, in many cases, contemplate *bona fide*, arms length divestitures, in any authentic sense of that term. Rather than selling at a real world market price to third party, competitive buyers, and retaining no control going forward over the stations ostensibly being conveyed, Sinclair, with a straight face, purports to sell at absurdly low prices. These do not pass the "smell test". Worse yet, Sinclair has handpicked buyers who are controlled by individuals with long-standing, close business and personal ties to the Smith siblings, owners of Sinclair. And Sinclair has assured itself of *de facto* control over these licensees with comprehensive, long- term, grossly one-sided "sidecar" agreements. These agreements would allow Sinclair to operate or influence all essential components of the stations, including sales, technical operations, "back office" functions, hiring of key and subordinate employees. and even programming a substantial portion of the broadcast week. In one case, Sinclair will lease back all non-license assets to the buyer, further facilitating its dominance over the licensee. Moreover, Sinclair has secured long-term options on the stations, essentially "warehousing" them for close to half a century for a *de minimis* option payment and an exercise price not much higher than the price Sinclair was paid by the optionor.

Given the foregoing, and Sinclair's decades-long history of similar divestiture scams and multiple violations of the Communications Act and the FCC's rules, the Commission would by now have been well within its plenary powers over broadcast transactions to designate Sinclair's merger for hearing, or even deny it out of hand. At the very least, the Commission should certainly have frozen consideration of the merger and the "shot clock" governing it indefinitely pending the outcome of its Inspector General's investigation of the manner in which the Commission's majority has greased the skids for approval of the merger AND the appeal of the Commission's 2017 reinstatement of the obsolete "UHF Discount", the thin reed upon which the legality of the merger clings.[2] The FCC's failure to do so has enabled Sinclair and thereby prolonged this matter far beyond reasonable bounds. Nevertheless, HRI demonstrates below that the fake divestitures notwithstanding, Sinclair's amended applications should be summarily denied or designated for hearing before an FCC Administrative Law Judge.

II. THE 'DIVESTITURES" ARE DECEPTIVE AND INSINCERE ATTEMPTS TO CIRCUMVENT THE FCC'S NATIONAL CAPS

A. Cunningham Broadcasting Is A Sinclair Front

[2] *See Free Press, et al. V. Federal Communications Commission*, D.C. Cir, 2017, No. 17-1129.

Sinclair proposes to spin off two stations, KDAF-TV, Dallas, Texas, and KIAH-TV. Houston, Texas, to KDAF, LLC and KIAH, LLC, subsidiaries of Cunningham Broadcasting Company, which already owns through a subsidiary KFTX-TV in Dallas. If the audiences reached by these stations in two of the top ten TV markets were attributed to Sinclair they would, standing alone, cause Sinclair to easily exceed the national cap, particularly if the UHF Discount is justifiably junked.

However, Cunningham, which morphed out of a predecessor Sinclair front, Glencairn Broadcasting Company in the early 2000's, has a long and storied history as a Sinclair creature, set up and operated as a vehicle to allow Sinclair to avoid exceeding the FCC's local and national ownership caps. Glencairn was ostensibly owned by Edwin Edwards, a former managerial employee of Sinclair, and later, Carolyn Smith, mother of the Smith brothers. In December 2001, the Commission majority fined Sinclair and Glencairn $40,000 each for an unauthorized transfer of control of Glencairn's stations to Sinclair as part of a multi-market transaction in contravention of Section 310 (d) of the Communications Act.[3] One key element of this holding was the sweetheart deal Glencairn was given, well below any reasonable market value. The FCC also conditioned its grant of the assignment applications at issue on the removal of two provisions in the Local Marketing Agreement between Sinclair and Glencairn. These provisions, objected to by the FCC's staff, allowed Sinclair to seek specific performance of the programming rights in the LMA and bestowed unfettered assignment of Sinclair's rights under the LMA to a third party.[4]

The Commission majority in *Edwards* did not designate Sinclair and Glencairn for hearing on misrepresentation grounds because it found that the parties were confused about applicable law and accordingly did not have *mens rea*. But Commissioner Copps, dissenting, urged that the unauthorized transfer of control to Sinclair was deliberate and methodical. All of the circumstances—the financing details, the relationships between the Smiths and their mother and the former manager, the ignorance of Edwards about key terms of the transaction—inevitably led to a conclusion that Sinclair deliberately set up a front to circumvent the FCC's duopoly rule. Designation was therefore in order.

Fast forward eleven years to 2012. Cunningham was now owned by a trust which had been formed for Ms. Smith's four sons as beneficiaries of the voting stock. The Smith siblings also owned all of the Cunningham non-voting stock, which constituted the lion's share of the front's equity. Edwards had taken his spoils from the 2001 transaction and long since left the scene. Upon Carolyn Smith's death in 2012, the trust was dissolved in 2013. Pursuant to FCC staff approval, Cunningham's voting shares were distributed to the Smith sons.[5] They in turn sold them for an absurdly low price approximating $400,000 for a TV group owner. The buyer was Michael Anderson, an investment banker who had been the Trustee of the Carolyn Smith Trust. In that role and prior thereto, Anderson had a close business and

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[3] *See Edwin L. Edwards, Sr.*, 16 FCC Rcd. 22236 (2001).

[4] Apparently, Sinclair has not learned any lesson from the imposition of these conditions more than two decades ago; similar provisions appear in Sinclair Station Service Agreements ("SSA's") and Option Agreements with Cunningham and other divestiture candidates presented to the Commission with the divestiture applications.. See p. 5.*infra*.

[5] See BALCDT-20171211ACN and BTCCDT-20130226AFW/AFX.AFY/AFZ/ AGC/ AGD/AGE.

personal relationship with David Smith. Not surprising then that Mr. Anderson was willing to grant options back to the Smith brothers for 32 years at a price based on the initial purchase price with a trivial annual kicker. He also had entered or would enter into a long-term SSA with Sinclair in many markets where it operated its stations in tandem with Cunningham stations..

Fast forward to 2018. Sinclair, desperate for "divestiture" partners it can get in bed with, focuses on, you guessed it, Cunningham. Initially, Sinclair proposes that Cunningham be spun off WPIX in the nation's largest market. When this proposal crashes and burns, Sinclair falls back to the Dallas and Houston sales currently proposed.

According to the sales documents attached to BALCDT-20180427ABL/ABM, Sinclair ant Tribune will divest to Cunningham two top ten market TV stations for $60 million dollars, a price south of most <u>single</u> major market <u>radio</u> deals. But, per standard Sinclair terms, Sinclair will have an irrevocable option to buy back the stations for an eight year term with five automatic renewal periods of eight years each at Sinclair's election. Thus, the stations are parked for Sinclair's benefit for potentially 48 years. Since no one else can buy them, the stations essentially have no sales value to anyone but Sinclair until 2066. For this extraordinary arrangement, Sinclair is required to pay only $10,000! The buyback purchase price is set at essentially the same amount as the purchase price, though it can increase if substantial cash flow levels are achieved. Sinclair may assign this right without Cunningham's consent, but Cunningham can assign its rights under the Option Agreement only with Sinclair's consent. Sinclair can enforce its rights by seeking specific performance from a court, gutting the alienability of the stations and preempting FCC consent to a sales transaction.[6][7]

Sinclair has not been transparent about how the financing for the Cunningham acquisitions will be structured and specifically whether Sinclair will take back paper to make the deal work. This is a decisionally significant issue because Sinclair owns most of Cunningham's equity through the Smith brothers' non-voting stock. If Sinclair also holds most of Cunningham's debt, Sinclair may well be deemed to have an attributable interest in its front, pursuant to the "equity debt plus" calculus in Note 2, section 3 to Section 73.3555 of the FCC's rules.

While the FCC has generally blessed Sinclair's and other sidecar agreements with an ostrich-like regularity, the foregoing facts scream out contrived, bogus and sham gaming. In the aftermath of the *Edwards* decision, which should have acted as a red line, Sinclair brazenly flaunts the same patently deceptive tactics as a last ditch attack on the FCC's authority under Section 310(b). Sinclair's tired protestations notwithstanding, Cunningham is an appendage of the Sinclair empire, an artifice whose credibility as an independent business entity is nil.

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[6] These type of provisions of course were forbidden by the *Edwards* decision. See p.4, *supra*.

[7] Of further note, Sinclair and Cunningham seemed to have used the same FCC and corporate counsel for this purportedly arms length transaction.

B. WGN CONTINENTAL BROADCASTING COMPANY, LLC, IS A SINCLAIR FRONT

The WGN deal is critically important for Sinclair because the stations it covers are legacy stations in one of America's largest TV markets. Moreover, the cable network that WGN is part of could serve as the springboard for a potential Sinclair cable news network challenging Fox News for a huge audience. Yet, the deal Sinclair has structured here is a transparent sham skewed heavily to serve Sinclair's fraudulent purposes, equally as phony as the Cunningham fiasco. Steven Fader, the *de jure* principal of the buyer, is CEO of a holding company based in Maryland that owns car dealerships. Probably not coincidental is the fact that David Smith owns the controlling interest in the auto conglomerate and sits on its Board. Thus, Fader works for Smith and presumably owes his job security to Smith. That same car company advertises heavily on Sinclair's home base station and is a tenant of Sinclair. Fader has no apparent broadcast experience and no connection to Chicago. The two companies share FCC and corporate counsel. How could a rational decisionmaker determine these entities are separate, independent players?

The agreements attached to the assignment application (BALCDT-20180227ABD) tell the story here. The front will pay an incredibly low 60 million dollars for the stations. In addition to an eight year SSA virtually identical to the other SSA's Sinclair utilizes, Sinclair will retain ownership of virtually all non-license assets and lease them back to WGN Continental. Thus, the latter is left with essentially a "bare license". It is dependent on Sinclair for its ability to broadcast, since access to the front's tower, transmission facilities, studios, business offices, etc. will emanate from the landlord. Pursuant to Sinclair's boilerplate JSA, Sinclair will act as the front's sales "agent", for a potentially cumulative period of 32 years, receiving 30% of the stations sales revenues. Sinclair will "broker" a substantial amount of WGN's programming at no cost to Sinclair. The licensee may preempt Sinclair's programming, but only when it "reasonably" believes the brokered programming would violate the law or not comport with the public interest. Sinclair will make its engineering staff available and have control, a veto power, over the station's promotional and IT efforts. The stations will "share" Sinclair's website. Sinclair will manage the front's accounts receivable collections and payroll. Sinclair will "inform" the licensee regarding sales revenues and station expenses. The agreements may not be terminated without Sinclair's consent and Sinclair may enforce them through specific performance. In return, WGN Continental will pay Sinclair $5,400.000 per month for Sinclair's "services" and $500,000 monthly in rent. The cumulative term of the option will of course be 48 years if Sinclair does not terminate. Indeed, Sinclair may unilaterally terminate after each eight year cycle.

And, of course, Sinclair will pay a paltry $10,000 for a long-term option. The option purchase price again will be keyed to Sinclair's sales price. A nominal cash flow excess kicker of 5% will be added, but the bottom line is that Sinclair will sell and ultimately buy at the substantially same price. This is the very definition of a sham parking arrangement, designed to allow Sinclair to divest in name only, with the opportunity to buy back at a bargain basement price when the Commission inevitably continues to liberalize its ownership rules.

C. ARMSTRONG WILLIAMS IS A SINCLAIR FRONT

The final member of the Sinclair scam divestiture triad is Armstrong Williams, controlling principal of Howard Stirk Holdings, LLC. That entity is the parent of the proposed buyer of Stations KUNS-TV, Bellevue (Seattle), Washington, KSTU, Salt Lake City, Utah, and KAUT-TV, Oklahoma City, Oklahoma.[8] Mr. Williams has a long and close business and ideological relationship with David Smith and Sinclair. In 2007, the FCC fined Sinclair $36,000 for broadcasts of Mr. Williams' Conservative talk shows. The Commission found that the programs included commentary and interviews supporting adoption of the Bush administration's "No Child Left Behind" education initiative, but neither Mr. Williams nor Sinclair disclosed that Mr. Williams had been retained to provide public relations services to the government regarding the initiative. This, the FCC concluded, violated the sponsorship ID provisions in the Communications Act and the Commission's rules.[9]

In 2013, Mr. Williams purchased two television stations in Michigan and South Carolina with financial assistance from Sinclair, which operated the stations under local marketing agreements (an earlier version of an SSA). The acquisitions were part of a larger $370 million deal, whereby Sinclair acquired the television properties of Barrington Broadcasting. In 2014 and 2015, Mr. Williams acquired several additional TV properties in Alabama and Utah, again in markets where Sinclair operated other stations and in some cases with financial assistance from Sinclair.

Given this background, it was hardly surprising that Sinclair turned to Mr. Williams as a spin-off candidate to facilitate approval of the Sinclair merger. Nor is it surprising that, in spite of Mr. Williams' insistence that most of his stations operate independently from Sinclair,[10] the Williams deal with Sinclair in Seattle, Oklahoma City and Salt Lake City is close to a carbon copy of the Cunningham and WGN transactions. The documents papering the deals are strikingly similar in language, structure, even in font. The deal is, in other words, a cookie cutter version of a Sinclair template that the triad of fronts are happy to sign off on.

The Asset Purchase Agreement for the Williams transaction in Oklahoma City stipulates a purchase price of $750,000, far below the market price of a major market television station. Like the other deals examined above, Sinclair will have a JSA of potentially 32 years' duration. He licensee cannot terminate the arrangement unilaterally. Sinclair will receive 30% of sales revenues. It will, as in the other deals discussed, have the right to program up to 25 hours or 15% of the station's program week. Again, the licensee will not have the unfettered preemptive rights a licensee typically enjoys. Rather, Sinclair's programming can only be preempted if the licensee "reasonably" believes it is unlawful or contrary to the public interest. An SSA will guarantee Sinclair operating power over the Williams stations for decades. The prototypical Sinclair option will warehouse the stations for Sinclair for almost five decades. The option price is once again $10,000. The option is once again assignable by right for Sinclair, but only

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[8] See BALCTDT-20180426ABP; BALCDT-20180426ABR; BALCDT-20180514ABF.
[9] *See* FCC 07-108, October 18, 2007.
[10] *See "It Borders On Regulatory Fraud"*, by Margaret Harding McGill, Politico, May 30, 2018.

with Sinclair's consent, if the Optionor wishes to assign. Finally, the buyback price is identical to the purchase price paid up front, except that if broadcast cash flow exceeds projected levels, the option purchase price will be increased by $100,000 for each $1 million dollars of excess. This exception of course may never occur, leaving the arrangement exposed as a transparent fraud. Even if it is triggered, the resulting price increase seems absurdly trivial over a 48 year cumulative term. [11] [12]

III. CONCLUSION

The Sinclair merger is the single most important broadcast merger in American history. The outcome of the FCC's and DOJ's consideration thereof will have major, perhaps cataclysmic, effects on local television, media concentration, the election process, and the First Amendment for decades to come. It is therefore imperative that the Commission scrutinize every element of the proposed merger and every factual claim made by Sinclair in support of the merger rigorously to determine where the public interest lies. HRI respectfully submits that the public interest is manifestly not served by the acceptance at face value of the "alternative facts" Sinclair has proffered concerning its proposed divestitures. Sinclair's claims that its fronts are independent are transparently dubious. They are inconsistent with business practice, common sense, human nature, and law. Sinclair's amendments raise more questions about Sinclair's motivations and intentions and those of its fronts than they answer. The Commission therefore must either designate this matter for hearing to seek answers to these questions on a full evidentiary record or deny the merger applications outright.

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[11] Another term in the option buyback provision is interesting. The Option APA states that, in any event, the Option Purchase Price shall not be "less than all outstanding debt from the acquisition." Thus, Mr. Williams is guaranteed that, when Sinclair buys back the stations, Mr. Williams will be made whole. He has no risk. It strains credulity to the limit that such a guarantee would be furnished in an arms length transaction, This is further evidence, if any was needed, that this is a "sweetheart" deal. It parks the stations with a reliable, co-dependent Sinclair front who is being rewarded for prior services as a front to Sinclair, until Sinclair is able to take the stations back.

[12] It is also noteworthy that construction of the Williams agreements is controlled by the law of the state of Maryland. That state, of course, is the longstanding home of Sinclair's headquarters. Neither Mr. Williams nor the stations being purchased have any nexus with Maryland.

CERTIFICATE OF SERVICE

I, Howard M. Weiss, hereby certify that on June 19, 2018, I caused a true and correct copy of the foregoing Petition to Deny to be served by electronic mail on the following:

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